

## The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

**UNITED STATES OF AMERICA,**

**Plaintiff,**

V.

HENRY ROSENAU

## Defendant.

No. CR06-157MJP

## MOTION FOR REVOCATION OF DETENTION ORDER

## **ORAL ARGUMENT REQUESTED**

NOTED: Wednesday, November 9<sup>th</sup> 2011  
at 9:00am

DEFENDANT ROSENAU, by and through his counsel of record, Craig A. Platt, respectfully submits this Motion for Revocation of Detention Order pursuant to Local Rule MJR 11 and 18 U.S.C. §3145(b). The Defendant respectfully moves this Court for an Order Revoking the Detention Order issued by Magistrate Judge Brian Tsuchida on October 28, 2011. This motion is based on the facts and law set forth below and the attached Redacted Affidavit of Padraig Mac Roibeard (Def. Exs 1).

## I. INTRODUCTION

Clear and convincing evidence is the standard that applies in a bond revocation hearing where it is alleged that a defendant violated the conditions of release. The government has not shown that Mr. Rosenau had any direct contact with witnesses. The government has not shown

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1 Mr. Rosenau authorized, had knowledge of, or ratified the actions of another third party who  
 2 attempted to make contact with Mr. Whelpley following imposition of release conditions. The  
 3 government has not met its burden and has not satisfied the clear and convincing evidence  
 4 standard.

5 Furthermore, even if it is assumed, in *arguendo*, that clear and convincing evidence of a  
 6 violation could be found—the court, before entering an order of revocation and detention, must  
 7 further find that there is no condition or combination of conditions that will assure that the  
 8 person will not flee or pose a danger to the safety of any other person or the community; or the  
 9 person is unlikely to abide by the conditions of release. Release conditions will assure Mr.  
 10 Rosenau's future appearance as well as the safety of others. Mr. Rosenau has and will comply  
 11 with all conditions of release.

## 12           **II. FACTS RELEVANT TO MOTION**

13           Padraig Mac Roibeard (hereinafter Mr. Roberts) is the founder and chairman of the  
 14 Progressive Nationalist Party of British Columbia. The Progressive Nationalist Party of British  
 15 Columbia advocates the secession of British Columbia from Canada and the legalization of  
 16 marijuana. Mr. Roberts is also actively involved in politics concerning the extradition process  
 17 between Canada and the United States. Def. Exs 1 (*Redacted Affidavit of Padraig Mac*  
 18 *Roibeard at ¶15*). Therefore, Mr. Roberts has taken a personal interest in the legal proceedings  
 19 concerning Mr. Rosenau.

20           Following the commencement of extradition proceedings in Canada related to this matter,  
 21 Mr. Roberts assisted Mr. Rosenau in obtaining legal counsel. *Id.* at ¶11. Mr. Roberts introduced  
 22 Mr. Rosenau to Mr. Douglas Jevning—a Canadian lawyer from Vancouver who provided Mr.  
 23 Rosenau with legal representation concerning the Canadian extradition proceedings. *Id.* at ¶11.  
 24 Following the decision of the British Columbia Court of Appeal decision concerning Mr.  
 25 Rosenau's extradition, Mr. Roberts introduced Mr. Rosenau to Dr. Gary Botting. Dr. Gary  
 26 Botting is one of Canada's leading authorities on extradition law. *Id.* at ¶12. After Dr. Botting  
 27 began representing Mr. Rosenau, Mr. Roberts assisted Dr. Gary Botting in a "pro bono paralegal  
 28 assistant type role." *Id.* at ¶12.

1           In the fall of 2010, Mr. Roberts came up with the idea that Mr. Whelpley was liable in  
 2 Canada for the false and malicious prosecution of Mr. Rosenau. *Id.* at ¶30. Mr. Roberts  
 3 contacted Dr. Botting about his “analysis,” but Dr. Botting declined any involvement. *Id.* at ¶34.  
 4 Therefore, Mr. Roberts took initiative to become Mr. Rosenau’s “agent” in the civil matter. *See*  
 5 *Id.* at ¶3, ¶44. Thereafter Mr. Roberts drafted a Notice of Civil Claim. *See* Dkt. No 51-1 at page  
 6 5; Def. Exs 1 (*Redacted Affidavit of Padraig Mac Roibeard* at ¶7). Finally, on or about January  
 7 17, 2011, Mr. Roberts filed suit against Mr. Whelpley. *See* Dkt. No. 51 at page 4.  
 8

9           On March 7, 2011, the Supreme Court of British Columbia in Quesnel, British Columbia  
 10 issued an Order enjoining Mr. Whelpley from leaving Canada. Dkt. No. 51-1 at page 19.  
 11 Thereafter, on March 9, 2011, Mr. Roberts emailed Kip Whelpley and notified Mr. Whelpley of  
 12 the Order. In this email Mr. Roberts explains that this matter is of “great political importance”  
 13 and that “it demonstrates the ends to which the US will go to secure, or blatantly manufacture,  
 14 false statements in extradition proceedings, and how Canadian courts and the Canadian minister  
 15 of justice simply rubber stamp every extradition request.” Dkt. No 51-1 at page 14. Mr.  
 16 Roberts further explains to Whelpley in this email that it is his “intention that the application  
 17 include an Order that you appear before a court reporter to answer questions about the degree  
 18 and method of coercion used against you and how you came to describe events in 2004 that  
 19 could not possibly have happened. *Id.* at page 13. Prior to this email, Roberts revealed to  
 20 Whelpley how he was the individual who drafted Notice of Civil Claim that initiated the civil  
 21 suit against Whelpley and further went on to explain: “I personally doubt you ever said what [the  
 22 AUSA] says you did, or in the alternative believe that the US authorities threatened and coerced  
 23 you into signing a prepared admission and in those circumstances you felt compelled to go along  
 24 with their lie. Dkt. No 51-1 at page 5.  
 25

26           On May 4, 2011, Mr. Rosenau was released from custody on the condition that he not  
 27 have direct or indirect contact with any existing and/or future witnesses in this matter. (Dkt. No.  
 28 13). Following his release, Mr. Rosenau showed Mr. Roberts the no contact order and clearly  
 29 stated to Mr. Roberts that he did not want any contact with Whelpley related to the civil  
 30 proceedings. Def. Exs 1 (*Redacted Affidavit of Padraig Mac Roibeard* at ¶46, ¶49). Mr. Roberts  
 31 was further instructed by Defense Counsel to not have any contact with Mr. Whelpley. *Id.* ¶51.  
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1 Mr. Roberts apparently made no further attempts to contact Mr. Whelpley until October 20,  
 2 2011. *See* Dkt. No. 51 at page 5.  
 3

4 Despite receiving clear instructions to make no further contact with Mr. Whelpley, Mr.  
 5 Roberts chose to act without any actual or apparent authority and emailed Mr. Whelpley on  
 6 October 20, 2011. Def. Exs 1 (*Redacted Affidavit of Padraig Mac Roibeaird* at ¶60, ¶63, ¶70). In  
 7 his email, Mr. Roberts seeks acknowledgement of receipt of the Order issued by the Supreme  
 8 Court of British Columbia and further informs Mr. Whelpley of the injunction against his entry  
 9 into the United States. Dkt. No. 51-1 at page 17.  
 10

11 Mr. Rosenau never approved of or ratified the actions of Mr. Roberts on October 20,  
 12 2011. Mr. Roberts acted alone. Mr. Rosenau had no knowledge of Mr. Robert's actions on  
 13 October 20, 2011. Mr. Roberts has used this case as an outlet to express his personal political  
 14 convictions. Mr. Rosenau is now subject to confinement due to the independent actions of  
 15 another.  
 16

17 Mr. Rosenau has been very cooperative and compliant with his Pre Trial Release  
 18 Conditions. He has travelled hundreds of miles and appeared at every court hearing, every  
 19 meeting with his Supervisor on Pre Trial Release, Julie Busic, and has even attended a meeting  
 20 in Seattle with AUSA Roe, at her request. He has no prior criminal history of any kind  
 21 whatsoever, and for sixty years has led an exemplary life, caring for his family, working hard as  
 22 a truck driver and heavy equipment operator, and assisting his ailing elderly mother and step-  
 23 father. In addition, his significant other, Veronica Shwartz, is dying from Stage 4 Cervical  
 24 Cancer, and relies on Mr. Rosenau for assistance and support. Unfortunately, Mr. Rosenau's  
 25 mother died yesterday. He would like to attend her funeral, and assist her disabled surviving  
 26 husband, Mr. Rosenau's step-father.  
 27

### 35           **III. LAW AND ARGUMENT**

#### 36           ***a. No Clear and Convincing Evidence***

37           The attorney for the Government may initiate a proceeding for revocation of an order of  
 38 release by filing a motion with the district court. "The judicial officer shall enter an order of  
 39 revocation and detention if, after a hearing, the judicial officer...finds that there is— (A)  
 40 probable cause to believe that the person has committed a...crime while on release; or (B) clear  
 41

1 and convincing evidence that the person has violated any other condition of release..." 18  
 2 U.S.C. §3148(b)(1). This statute places the burden of proof on the government. The government  
 3 must show clear and convincing evidence of a violation of release conditions.  
 4

5 Clear and convincing evidence "is a heavier burden than the preponderance of the  
 6 evidence standard." *Murphy v. I.N.S.*, 54 F.3d 605, 610 (C.A.9,1995); *see also* Ninth Circuit  
 7 Model Civil Jury Instructions 1.4 Burden of Proof—Clear and Convincing Evidence. Clear and  
 8 convincing evidence has been described as evidence that will place in the ultimate fact finder an  
 9 abiding conviction that factual contentions are highly probable. *Colorado v. New Mexico*, 467  
 10 U.S. 310, 316, 104 S.Ct. 2433, 2438 (1984).

11 Here, following the imposition of release conditions, Mr. Rosenau was adamant about  
 12 complying with the conditions of his release. In fact, Mr. Rosenau initiated contact with Julie  
 13 Basic to seek a clarification as to who the potential witnesses in the case were out of fear that he  
 14 would make contact with a witness unwittingly. Furthermore, Defense Counsel for Mr. Rosenau  
 15 told Mr. Roberts to have no contact with Whelpley. Finally, Mr. Rosenau personally explained  
 16 to Mr. Roberts that he did not want any contact to be made with Whelpley concerning the civil  
 17 suit. Mr. Roberts has admitted that he acted alone. Mr. Robert's political leanings and  
 18 convictions were the driving force behind his independent actions. Mr. Rosenau did not have  
 19 indirect contact with Whelpley. Mr. Roberts acted alone, against the express wishes and  
 20 instructions of Mr. Rosenau and his attorneys.  
 21

22 Release conditions were placed on Mr. Rosenau on May 4, 2011. The government has  
 23 offered 7 exhibits in an attempt to show a violation of the release conditions (Dkt. No. 51-1).  
 24 Exhibit 1 concerns emails sent by Mr. Roberts prior to May 4, 2011. Exhibit 2 concerns Letters  
 25 of Robert Moffat, Canadian Counsel for Kip Whelpley all dated prior to May 4, 2011. Exhibit 3  
 26 concerns additional emails sent my Mr. Roberts prior to May 4, 2011. The government has only  
 27 offered a single email written after May 4, 2011. This email was not written by Mr. Rosenau,  
 28 was not authorized by Mr. Rosenau, and was not ratified by Mr. Rosenau. The government has  
 29 failed to meet its burden by producing clear and convincing evidence that Mr. Rosenau violated  
 30 conditions of his release.  
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1                   ***b. Conditions Will Assure Appearance and Safety of Others***

2                   In addition to finding clear and convincing evidence of a violation of a release conditions,  
 3 the judicial officer must also find, “(A) based on the factors set forth in [18 U.S.C §3142(g)], that  
 4 there is no condition or combination of conditions of release that will assure that the person will  
 5 not flee or pose a danger to the safety of any other person or the community; or (B) the person is  
 6 unlikely to abide by the conditions of release.” 18 U.S.C. §3148(b)(2).

7                   The Defense maintains that the government has not shown that Mr. Rosenau has violated  
 8 release conditions, and not shown that Mr. Rosenau is unlikely to abide by future conditions nor  
 9 that no conditions will assure his presence and safety of others. To the contrary, Mr. Rosenau  
 10 has been extremely cooperative while on release and has appeared at Court when required (e.g.  
 11 most recently on 10/28/2011). Mr. Rosenau does not pose a danger to others. Mr. Rosenau has  
 12 and will continue to abide by all conditions of his release. The government has been unable to  
 13 show evidence to the contrary. Finally, detaining Mr. Rosenau will not prevent Mr. Roberts  
 14 from continuing to act on his own initiative, without authorization from Mr. Rosenau. Mr.  
 15 Roberts is beyond Mr. Rosenau’s control.

16                   **IV. CONCLUSION**

17                   18 U.S.C. §3148 requires clear and convincing evidence of a violation of a release  
 18 conditions before the defendant may be detained. Mr. Rosenau did not violate the conditions of  
 19 his release. The government has not presented clear and convincing evidence of a violation. Mr.  
 20 Roberts acted independently based on his own personal political zealotry.

21                   Additionally, 18 U.S.C. §3148 requires the government to show that the defendant will  
 22 likely violate conditions again or that no combination of conditions will assure future appearance  
 23 or the safety of others. Mr. Rosenau has been compliant during his release and has abided by the  
 24 conditions of his release. Mr. Rosenau is likely to abide by future conditions and does not pose a  
 25 flight risk or danger to the community. The government has not shown Mr. Rosenau will violate  
 26 future conditions and has not shown he poses a flight risk or danger to others.

1 Respectfully submitted this 4<sup>th</sup> day of November, 2011.  
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20 CERTIFICATE OF SERVICE  
21  
22 I hereby certify that on 11/4/2011, I electronically filed the foregoing with the Clerk of  
23 the Court using the CM/ECF system which will send notification of such filing to the attorney(s)  
24 of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the  
25 defendant(s) that are non CM/ECF participants via telephax.  
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s/Craig Platt  
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